93-379

Supreme Court, U.S.
FILED
SEP 2 1993
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term , 1993

JOSHUA VANDERVELDEN

PETITIONER

VS.

BENJAMIN VICTORIA, M.D.

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE FIRST DISTRICT COURT OF APPEALS OF THE STATE OF WISCONSIN

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Supreme Court

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QUESTIONS PRESENTED

1. Does the right of privacy set forth in the 1st, 4th, 5th 9th, and 14th amendments, established in Roe v. Wade 410 U.S.113, 35 L.ed. 2d 147, 93 S. Ct. 705(1973) and its progeny, impose any limitations on states providing rights to the unborn?

   The following question will be raised, secondary to the foregoing question, in the event certiorari is granted:

2. May a doctor, sued for battery by unborn person later born alive, have standing to raise the said constitutional right of privacy of the mother founded on Roe v. Wade, supra, as a defense to the plaintiff's common law battery suit?

LIST OF PARTIES TO THE ACTION

The parties to the proceeding in the Wisconsin Courts were:

Joshua Vandervelden, Plaintiff and respondent in the Wisconsin Court of Appeals.

Benjamin Victoria, defendant, and appellant in the Wisconsin Court of Appeals.

AMICI appeared in the Wisconsin Court of appeals as follows:

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OPINION BELOW

The opinion below is in the Wisconsin Court of Appeals and is reported at 177 Wis. 2d 243, ___ N.W. ___ 2d(1993), and is set forth in the appendix at pp. 2a - 13a.

JURISDICTION AND CONSTITUTIONAL PROVISIONS

The judgment of the Wisconsin Court of Appeals is dated May 18, 1993. No rehearing proceedings are available in said Court and no extension of time has sought to file this petition for a writ of certiorari. The Wisconsin Supreme Court denied a petition to review on June 16, 1993.

The constitutional provisions involved in this case are those underlying the constitutional right of privacy, specifically, the 1st, 4th, 5th, 9th and 14th amendments to the Federal

Constitution. These are set forth in the appendix, pp. 36a - 38a.

The United States Supreme Court has certiorari jurisdiction under 28 U.S.C. 1257(a).

STATEMENT OF THE CASE

Petitioner was en ventre sa mere at a point of 6-8 weeks into gestation on Jan. 12 1979 when respondent performed an abortion on his mother, who is not a party to this action. Petitioner survived the abortion and was delivered alive by cesarean on Sept. 18, 1979 and is alive today. He sued in 1989 for damages he suffered by reason of the trauma of the abortion, in circuit court Milwaukee County Wisconsin. The cause of action pleaded (Appendix p. 23a - 24a) alleged battery under Wisconsin common law. Defendant moved to dismiss in the trial court arguing that his conduct was justified under Roe v. Wade 410 U.S. 113, 35 L.ed. 2d 147, 93 S. Ct. 705(1973) because the mother consented. (App. 25a-35a). The trial court rejected the defense and ruled that Wisconsin common law embodied in Puhl v. Milwaukee Mutual Ins. Co. 8 Wis. 2d 343, 99 N.W. 2d 163(1959) provid-

ed the unborn with rights from conception onwards while en ventre sa mere. (App. 19a -22a trial court decision). The case went to trial and a jury found a battery was committed and awarded compensatory damages of $1,150,000. The respondent appealed to the Wisconsin Court of Appeals, reiterating said argument (App. 37a-39a), which reversed on May 18 1993, ruling that petitioner was not a person entitled to legal protection under Roe v. Wade and that his mother's consent thereunder barred the suit (App. 2a-13a).

REASONS FOR GRANTING THE PETITION

Based primarily on Roe v. Wade, the Wisconsin Court of Appeals gave effect to an argument of the respondent doctor who performed an abortion upon petitioner's mother while petitioner was en ventre sa mere, to the effect that petitioner had no pre-natal rights, inchoate or otherwise against said doctor for the injuries he suffered due to the trauma of the abortion procedure, which he survived, thereby denying him rights otherwise available to him under state law. The court's ruling that Roe precluded any rights to him as an unborn person was contrary to the common law protection

theretofore provided by decisions of the Wisconsin Supreme Court that allowed for such recovery subject to no other qualification than subsequent birth. Wisconsin was in accord with all other jurisdictions ruling on the point up to this case, and said ruling upset the traditionally afforded prerogative to the states to formulate their common law free from federal scrutiny.

I. IMPORTANT QUESTIONS ARE PRESENTED, TOUCHING UPON THE ACCOMMODATION OF STATE COMMON LAW RIGHTS AND FEDERAL CONSTITUTIONAL RIGHTS.

A. Standing to Raise Federal Constitutional Rights.

In both the trial and state appellate court, respondent asserted the mother's constitutional right of privacy to obtain the abortion as his defense to the suit, raised by him on summary judgment in the trial court, and on appeal. The trial court rejected that argument but the Court of Appeals impliedly upheld it, as relied on Roe in ruling that petitioner possessed no legal rights whatsoever, not just under the Federal Constitution, the latter being the apparent outer limit of the Roe v. Wade holding. The issue of standing was raised in the Wisconsin

Court, which passed over said issue of standing, which petitioner raised in briefing therein, without commenting on the same.

The question of standing goes to the jurisdiction of the United States Supreme Court and must be decided even though, as was the situation in the Wisconsin court, that court passed over said issue without comment. Jenkins v. McKeithen 395 U.S. 411 89 S. Ct. 1843, 23 L.ed. 2d 404(1969). Here, the issue of standing of respondent to raise the mother's right (she not being a party) presents a conflicting area of law. Compare e.g., Roe v. Wade, supra and Tileston v. Ullman 318 U.S. 44, 63 S. Ct. 493, 87 L.e.d 603(1943) wherein a physician was denied standing to raise the rights of a patient, with Griswold v. Connecticut 381 U.S. 479, 14 L.ed. 2d 510, 85 S. Ct. 1678(1961) where the physician was given such standing. The Wisconsin court's holding in this respect, considering the Roe defense raised, and impliedly holding respondent had standing to raise such, was contrary to prior Wisconsin cases that uniformly

held that one may not assert the rights of others for his or her own benefit.[1]

B. The Existence of a Federal Question.

The Wisconsin Court's holding that Roe v. Wade precluded any legal rights on the part of petitioner, constituted a ruling restricting such rights far beyond Roe v. Wade and its progeny, which impliedly limit the denial of rights to unborn persons to rights arising under the federal constitution. The Wisconsin court erroneously took the Roe ruling to mean the unborn had no legal rights of any kind, under state common law for intentionally inflicted injuries.[2]

Such holding runs counter to, and is in conflict with, the language of the United States Supreme Court in Webster v. Reproductive Health Services, 492 U.S. 490, 106 L.ed. 2d 410, 109 S. Ct. 3040(1989) wherein the court said at 492 U.S. 519:

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1. Mast v. Olsen 378 N. W. 2d 305, 89, Wis. 2s 12(1979); State v. Horn 377 N.W. 2d 176, 126 Wis. 2d 447(Ct. App. 1985), rev. granted 393 N.W. 2d 544, 132 Wis. 2d 483, affd. 407 N.W. 2d 854, 139 Wis. 2d 473.
2. The Wisconsin Court of Appeals did hold that the unborn had rights in common law negligence, but as is shown in part II(B) of argument, such rights are unavailable to petitioner and thus, the state ground asserted that petitioner had a cause of action in negligence is not an adequate ground to deny review.

> "We do not see why the state's interest in protecting human life should come into existence only at the point of viability and that there should thereafter be a rigid line allowing state regulation after viability but prohibiting it before viability."

The Webster case ruling lessens any Roe restriction on state regulation of pre-viable life to effectively indicate to the states they were free to undertake such regulation if they wished to do so. The Wisconsin court thus misconstrued and misapplied Roe, and ignored the Webster language cited above, and in doing so, made its judgment rest upon an erroneously decided federal ground [3] – a federal ground that the Wisconsin court caused to unduly infringe upon state common law remedies available independently of the federal constitution, that Wisconsin and other states have traditionally afforded to the unborn, both viable and on-viable, whenever the issue was presented to such state courts. [4] Where such

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3. Oregon v. Mathiason 429 U.S. 492, 97 S. Ct. 711, 50 L.ed. 2d 714(1977).
4. The following jurisdictions allow recover for pre-natal injuries inflicted at any time during gestation, a trend that began in 1953: Kelly v. Gregory 125 N.Y.S. 2d 696, 282 A.D. 542(1953); Hombuckle v. Plantation Pipe Co. 93 S.E. 2d 727, 212 Ga. 504 (1956); LaBlue v. Specker 358 Mich. 558, 100 N.W. 2d 445(1960); Womack v. Buckhorn 187 N.W. 2d 218, 384 Mich. 718(1971); Torrigan v. Watertown News Co. 352 Mass. 446,

erroneously decided federal ground underlies the state *court ruling*, a federal questions arises and the United States Supreme Court has jurisdiction. Herb v. Pitcairn 324 U.S. 117, 125-6, 65 S. Ct. 459, 89 L.2d 789(1954). Furthermore, by rejecting petitioner's plea for pre-natal rights under the state common law provided by Puhl v. Milwaukee Mutual Ins. Co., supra, the Wisconsin court

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4. (Continued)
225 N.E. 2d 926(1967); Smith v. Brennan 157 A. 2d. 497, 31 N.J. 353(1960); Sinkler v. Kneale 164 A. 93, 401 Pa. 267(1960); LaBree v. Major 306 A. 2d 808, 111 R.I. 657(1973); Yandell v. Delgado 471 S.W. 2d 569(Tex. 1971); Sana v. Braun 35 Ill. App. 425 183 N.E. 2d 187(1962 Ill. App.); Simon v. Mullin 34 Conn. App. 139, 380 A. 2d 1353(1977); Wolf v. Isbell 291 Ala. 327, 280 S. 2d 758(1973); Day v. Nationwide Ins. Co. 328 S. 2d 560(Fla. App. 1976).

The following cases are specific examples of state affordation of common law rights to non-viable fetuses when injured en ventre sa mere: Presley v. Newport Hospital 117 R.I. 117, 365 A. 2d 478(R.I. 1976); Simon v. Mullin, supra; Day v. Nationwide Ins. Co., supra; Evans v. Allen 550 P. 2d 924(Okla. 1976); Green v. Smith 377 N.E. 2d 37, 71, Ill. 2d 501(Ill. 1978); Stahlman by Stahlman v. Youngquist 473 N.E. 2d 400, 129 Ill. App. 3d 859, 85 Ill. Dec. 32(Ct. of App. 1984); Kalafut v. Gruver 389 S.E. 2d 681(Va. 1990);

States have even allowed recovery to the unborn in tort for conduct committed prior to conception that damages a later unborn fetus: Bergstresser v. Mitchell 577 F. 2d 22(8th circ. 1978 - prior cesarean negligently done damaged baby in subsequent pregnancy); Renslow v. Mennonite Hospital 40 Ill. App. 3d 234, 351 N.E. 2d 870(1976 - incompatible blood transfusion prior to conception sensitized maternal blood and damages subsequently conceived baby); Jorgenson v. Meade Johnson Laboratories 483 F. 2d 347(10th circ. 1973 - drug damaged maternal chromosomes and injured later conceived baby).

In Wisconsin, the Puhl rule was expanded to allow recovery for the wrongful death of the unborn where stillbirth followed pre-natal injury. Kwaterski v. State Farm Mutual Ins. Co. 34 Wis. 2d 14, 148 N.W. 2d 107(1967)

exercised the very authority it claimed it did not have, for it had authority, under Puhl, Roe and Webster to enunciate such protection under state common law. However, under the apparent compulsion of the federal constitutional rule of Roe, it declined to provide such rights. This creates a federal question[5], Radio Station WOW Inc. v. Johnson 326 U.S. 120, 65 S. Ct. 1475, 89 L.ed. 209(1945) which gives the Supreme Court jurisdiction. Zacchini v. Scripps Howard Broadcasting Co. 433 U.S. 562, 97 S. Ct. 2849, 53 L.ed. 2d 965(1977).

C. Raising the Federal Question.

Whether the federal question, itself, was sufficiently raised in the state courts is, itself a federal question which gives the Supreme Court jurisdiction.[6] Respondent's assertion in the trial court by briefing on motion for summary judgment (App. 25a - 35a) and in the Wisconsin Court of Appeals by briefing urging reversal of the trial court judgment, that his conduct was pro-

5. That question of course, being "Does the right of privacy as established in the 1st, 4th, 5th, 9th and 14th amendments impose any limitations on states with respect to providing inchoate rights to non-viable unborns who are later born alive?"

6. Street v. New York 394 U.S. 576, 22 L.ed. 2d 318, 89 S. Ct. 1354(1969); Staub v. Baxley 305 U.S. 315, 318, 78 S. Ct. 277, 21 L.ed. 2d 302(1958).

tected by reason of Roe, raised the issue of both his standing to assert the mother's right and the issue of whether or not states may protect pre-natal life during non-viability, and if so, to what extent such protection may be afforded under Roe and its progeny, and made said issue the central issue of this case. Staub v. Baxley note 6 supra, 305 U.S. at p. 318 holds that the United States Supreme Court is not concluded by the view taken by the state court as to the existence of a federal constitutional issue before it. Thus, the state court's silence as to the standing issue (except the implicit inference that standing was afforded to respondent by the Court's discussion of Roe) as well as on the federal issue of the effect of the Roe ruling on state common law is sufficient to raise the issue before the United States Supreme Court.

D. The Opinion of the Wisconsin Court of Appeals Fails to provide for accommodation of state common law rights and federal constitutional rights.

Wisconsin, as do most other states (see f.n. 4 supra)

protects pre-natal life from conception onwards. The Wisconsin cases of Puhl, supra, and Kwaterski, supra, f.n. 4, reflect the public policy of Wisconsin that insists on such rights being provided to the unborn, subject to the contingency of birth. States traditionally have been free from federal scrutiny in developing and moving their common law. As Justice Brandeis has said, in defining the clear exclusivity of the states in this area:

> "Except in matters governed by the federal constitution, or by acts of congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal common law. Congress has no power to declare substantive rules of common law applicable in a state, whether they be local in their nature or "general", be they commercial law or part of the law of torts." Erie R. Co. v. Tompkins 304 U.S. 64, 78, 58 S. Ct. 817, 82 L.ed. 1187, 114 ALR 1487(1938).

Justice Brandeis went on in Erie to cite Justice Holmes' language from Kuhn v. Fairmount Coal Co. 215 U.S. 349, 370-2, 30 S. Ct. 140 54 L.ed. 228(1910):

> "...the common law, so far as it is enforced in a state, whether called common law or not, is the common law generally, but the law of that state, existing by the authority of that state without regard to what it

> may have been in England, or anywhere else...The authority and only authority is the state, and if that be so, the voice adopted by the state as its own (whether it be of the legislature or of its Supreme Court) should utter the last word." Erie, 304 U.S. at 79.

The arguments of respondent before the trial court and Court of Appeals and the Court's ruling that held Roe precluded any legal rights on behalf of petitioner by reason of the consent of the mother, exercised pursuant to Roe, creates unnecessary tension between state law and federal constitutional law, and fails to provide for any accommodation, where no pre-emption by Congress has occurred. This issue of accommodation is a federal question which, itself, is a basis for granting the petition. Koysdar v. National Cash Register Co. 417 U.S. 62, 94, S. Ct. 2108 40 L.ed. 2d 660(1974).

II. NEITHER AN ADEQUATE NOR AN INDEPENDENT STATE GROUND SUPPORTS THE LOWER COURT JUDGMENT.

It is the province of the United States Supreme Court to inquire whether non-federal grounds put forth in the state court opinion were without any fair or substantial

support.[7] The adequacy of a state law ground to support a judgment is itself a federal question.[8]

The Wisconsin court's decision on its face purports to rest upon 3 state grounds:

1. That petitioner did not prove the element of battery;
2. That petitioner's cause of action should have been negligence.
3. That the consent of the mother barred the suit.[9]

It is also initially noted that the Wisconsin court discussed Roe v. Wade as well as the above state grounds, and in doing so made no plain statement that its decision rested on adequate and independent state grounds. In such case the United States Supreme Court assumes the reasonable - namely, that the state court decided the

7. Ward v. Love County 253 U.S. 17, 22, 64 L.ed. 751, 758, 40 S. Ct. 419(1919).
8. Howlett v. Rose 496 U.S. 356, 366 f.n.l. 110 S. Ct. 2430, 110 L.ed. 2d 332(1990).
9. Petitioner argued below separately, that the state constitution allowed the cause of action. The Court of Appeals held it did not. Petitioner does not claim any federal issue in such ruling. Thus, if the state may allow the cause under its common law, with accommodation with Roe, then the fact that the state court rejected the state constitution argument becomes irrelevant to the jurisdiction to grant this petition at bar, since the case could have a different outcome on the state common law ground standing alone.

case that way because it felt federal law required it do to so.[10] At bar, the Wisconsin court's consideration of Roe and its preclusionary ruling, gleaned by the Wisconsin court from Roe that no legal rights insure to the non-viable unborn under state law, indicates that the Wisconsin Court believed the other issues were insufficient to resolve the case in and of themselves, and that a bases on the federal constitution was presented and a necessary part of its review.[11] Otherwise, of course, it would have discussed solely the state points without reference to Roe.

This constitutes an interweaving in the decision, of the state ground, thereby showing there was no independent state ground (and as shown hereafter, no adequate state ground, either), on which to base said ruling. The 3 state grounds mentioned in the Wisconsin court opinion, noted above, are now discussed.

A. The Statement of the Wisconsin Court, that Petitioner

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10. Illinois v. Rodriguez 497 U.S. 177, 110 S. Ct. 2793, 111 L.ed. 2d 148(1980). Milkovich v. Loraine Journal Co. 497 U.S. 1, 110 S. Ct. 2695, 111 L.ed. 2d 1(1990).
11. New York v. Class 475 U.S. 106, 106 S. Ct. 960, 89 L.ed. 2d 81(1986) at 106 S. Ct. 964.

Did Not Prove One Element of a Wisconsin Common Law Cause of Action in Battery Is Not an Adequate State Ground.

The Wisconsin court held that petitioner had to prove that respondent's conduct was "unlawful", which it said, petitioner did not prove at trial. However, Wisconsin law is clear, that acts need not be unlawful to be actionable for battery. All that Wisconsin battery law requires, as seen thru Wisconsin Supreme Court decisions, for proof are the intent to cause contact and the contact being unpermitted. In the most recent Wisconsin battery case, not referred to by the Wisconsin Court, the Wisconsin Supreme Court said:

> "If a defendant acts, intending to cause contact and the contact is unpermitted...it follows that the intent is also unlawful. McCluskey v. Steinhorst 45 Wis. 2d 350, 357, 173 N.W. 2d 148, 152(1970).

This concept was cited with approval later by the Wisconsin Supreme Court [12] and is the law of battery in Wisconsin as applied to physicians making unpermitted

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12. Trogun v. Fruchtman 58 Wis. 2d 569, 594, 207 N.W. 2d 297, 310(1973).

contacts on others.[13] Thus, the purported state ground of there being no unlawful act, (and therefore no proof of battery) as set forth by the Wisconsin Court, runs contrary to prior Wisconsin case law from its Supreme Court and, therefore, constitutes no adequate ground. NAACP v. Alabama 357 U.S. 449, 78 S. Ct. 1163, 2 L.ed. 2d 1488(1958).

B. The Ruling that the Petitioner Should Have Sued In Negligence not Battery, is not an Adequate State Ground.

Petitioner herein pleaded Wisconsin common law battery upon his person, then en ventre sa mere, as his cause of action, since the respondent's conduct involved the intentional infliction of suction force upon his body and placenta, intended to tear the body and placenta to pieces and remove the remnants of the same from the uterus by suction force, a classical battery situation. The Wisconsin court held (App. 13a) that the suit had to have been brought in negligence, not

13. Suskey v. Davidoff 2 Wis. 2d 503, 87 N.W. 2d. 306(1957); Throne v. Waddell 176 Wis. 97, 186 N.W. 146(1922); Paulson v. Gunderson 218 Wis. 578, 260 N.W. 448(1935).

battery. On its face, without further evaluation, such might appear to be an independent state ground. However, on evaluative analysis, said state ground of "negligence" is unreasonable, and lacking substantial support.[14] The reasons it is so are:

1. Requiring petitioner to allege negligence as the basis for the harm inflicted provides him with no usable cause of action, and thus, is unreasonable.

By requiring negligence as a source of petitioner's rights under state law for conduct directed towards the intentional destruction of petitioner's body, the court in effect said petitioner should allege:

> "Doctor, when you performed the abortion on my mother, you negligently put the suction curette in the wrong place. As a result, instead of destroying my body, like you were supposed to, causing me to die, I'm alive, and that's your 'fault'!"

Such assertion, based on negligence, self destructs on

14. These are instances of inadequacy of state court grounds that give the United States Supreme Court jurisdiction. Johnson V. Risk 137 U.S. 300, 307 11 S. Ct. 111, 34 L.ed. 683(1980); Abie State Bank v. Bryan 282 U.S. 765, 773, 776-7, 51 S. Ct. 252, 75 L.ed. 690(1930); Ward v. Love County 253 U.S. 17, 22, 40 S. Ct. 419 64 L.ed. 751(1919); Lawrence v. State Tax Comm. 286 U.S. 276, 282-3 52 S. Ct. 556, 76 L.ed. 1102(1931).

presentation under the weight of logic and reason, thereby making said supposed cause of action, in effect, unavailable to the petitioner.

2. The Opinion, as Regards Negligence, is Contrary to Previous Wisconsin Supreme Court Holdings.

In Puhl v. Milwaukee Mutual Ins. Co., supra, the inchoate prenatal rights of the unborn to sue from conception onwards was enunciated without any qualification other than the unborn be later born alive. The Wisconsin Supreme Court later expanded this rule to provide the unborn with prenatal rights for wrongful death when stillbirth followed, caused by such prenatal torts. Kwaterski v. State Farm Mutual Auto Ins. Co., supra, p.17.

Petitioner argued the applicability of Puhl in the trial court which denied respondent's summary judgment motion (which respondent argued that he was entitled to under Roe) and based its decision on Puhl. However, the Court of Appeals interpreted Puhl as inconsistent with providing the rights petitioner sought to enforce

because Roe v. Wade precluded there being any legal rights of any kind in the unborn. The Wisconsin court's ruling is thus contrary to said prior ruling case. This suffices to give the United States Supreme Court jurisdiction. NAACP v. Alabama 357 U.S. 449, 2 L.ed. 2d 1488 S. Ct. 1163(1958).

3. The Wisconsin Court Substituted the Perspective of Respondent's Conduct, from that of Petitioner to That of Petitioner's Mother.

What the court attempted to do and did do, was to substitute the perspective of the respondent's conduct from that of petitioner (the sole plaintiff) to that of this mother, who is not a party. True, from the mother's perspective, were she to have sued, this conduct was negligent, but not so from the perspective of petitioner. This misaligned perspective makes the holding unreasonable and arbitrary, and is the third basis for the conclusion that there was no adequacy in that state ground of decision, namely, that petitioner's sole cause would be in negligence. In such situation, the United States

Supreme Court is not barred from granting certiorari.[15]

4. The state court's ruling premise was wrong. It said:

> "Negligence law, not battery law, provides the appropriate basis for determining physician liability where the plaintiff alleges that the physician improperly performed a medical procedure." (App. 13a)

In plaintiff's complaint, (App. 18a), no allegation is made that the respondent improperly performed any medical procedure. Battery, instead is alleged. The state court's judgment, therefore, is additionally unreasonable and arbitrary, providing still another ground to reject the "negligence" ground set forth, below, as inadequate. See notes 14 and 15, supra.

C. The Asserted State Ground that the Consent of the Mother Barred the Suit, is Not an Independent Nor an Adequate State Ground.

This ground may not constitute an independent and adequate state ground for several reasons:

A. The Wisconsin Court did not follow the ruling case

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15. Ward v. Love County, supra; Union Pacific R. Co. v. Public Service Comm. 248 U.S. 67, 63 L.ed. 131, 39 S. Ct. 24(1918); Davis v. Wechsler 263 U.S. 22, 44 S. Ct. 13, 68 L.ed. 143(1923).

law as regards the rights of incompetents, including minors, such as petitioner was and is. That law holds as follows:

1. Minors are not bound by their consent and may avoid such at any time before majority.[16]
2. Incompetents (by definition, including minors) may not give their consent to irrevocable medical procedures that detriment them.[17]
3. Parens Patriae requires courts to ensure that an incompetent's best interests are protected, and the state supreme court has said that continued life is in an incompetent's best interests.[18]

In the state court, petitioner never argued that his consent was required, nor did respondent. Petitioner's argument was that he could avoid any consent, his or his mother's prior to majority, based on state law. (Notes 16-

16. Kiefer v. Fred Howe Motor Co. 39 Wis. 2d 20, 158 N.W. 2d 288(1966).

17. Matter of the Guardianship of Eberhardy 97 Wis. 2d 654, 294 N.W. 2d 540, affd. 102 Wis. 2d 539, 307 N.W. 2d 881(Ct. App. 1990).

18. Matter of the Guardianship of L.W. 167 Wis. 2d 53, 482 N.W. 2d 60(1992). L.W. also says that the state has an interest in protecting life and its sanctity. 482 N.W. 2d at p. 74. In the light of these three cases, the unreasonableness and untenability of the state court's judgment, involving a sweeping rejection of any rights of unborns, is apparent. NAACP v. Alabama, supra, p. 31.

18 supra). The court discussed an argument nobody made, namely, "fetal consent" (App. 11a-13a) and made no discussion of–

1) petitioner's argument of avoidance of consent;
2) the holding that incompetents may not give their consent and that any consent they might gives does not bind them;
3) the state's interest in protecing life. (Notes 16-18, supra).

In the light of these Wisconsin Supreme Court statements in Eberhardy, L.W. and Puhl, supra, and of the United States Supreme Court's statement in Webster, supra p.16, the proffered state ground of "consent" constitutes a deviation from ruling Wisconsin law regarding rights of incompetents, and thus is untenable and inadequate. In such cases, the United States Supreme Court has jurisdiction. NAACP v. Alabama, supra, p. 25.

This brings into perspective the essence of the consent issue –namely, the compulsivenss of Roe upon the Wisconsin court and the interweaving of the Roe lan-

guage with the state law ground of "consent".

B. The Compulsiveness of Roe on the state court ruling.

Roe was a guiding point for the Wisconsin Court to formulate its ruling, which was, that petitioner not only had no legal rights whatsoever, but also, that Roe v. Wade implicity underlay the Wisconsin court's reasoning that the consent of petitioner's mother barred him from asserting his state common law cause of action. Since the consent of petitioner's mother is derived from and based on the abortion right that is founded on the 1st, 4th, 5th, 9th and 14th amendment's privacy right, this conclusion is justified and, had the Wisconsin court followed Wisconsin State Supreme Court's prior holding in Puhl, supra, that provides unborns with inchoate rights during gestation that ripen into enforceability upon live birth, a different result is likely. In this respect the state law ground of "mother's consent" and the Roe based right of privacy upon which such consent was exercised are so inextricably interwoven that in the absence of a plain statement that the state court decision rests on an

adequate and independent state ground, the United States Supreme Court must assume the reasonable – namely, that the state court decided the case in the manner in which it did because it felt that the Roe decision compelled it to do so.[19] Furthermore, this ruling which obliterates all legal rights whatsoever to unborns, far exceeds the parameters of the Roe ruling, which can reasonably be said to preclude only federal constitutional rights from its intendments, without other preclusion.[20] The magnitude of this compulsion is overbearing, since the rights of petitioner to proceed under his theretofore existing state common law prenatal rights were established, and were not incompatible with the rights of privacy that Roe provides to petitioner's mother to have the abortion.

THE RIGHTS OF PETITIONER CAME INTO ESSE AT THAT POINT IN TIME THAT THE ABORTION PROCEDURE WAS OVER, AND THE PETITIONER HAD SUR-

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19. Illinois v. Rodriguez, supra, note 10; State Tax Commissioner of Utah v. Van Cott 306 U.S. 511, 83 L.ed. 950, 952, 59 S. Ct. 605(1938).
20. Oregon v. Mathiason, supra, note 3. The state court misapplied Roe, and gave no heed to Webster, supra, and Planned Parenthood of Southeastern Pennsylvania v. Casey, p. 3512, herein.

VIVED ITS TRAUMA. AT THAT POINT IN TIME THE PETITIONER'S MOTHER HAD HER ROE RIGHTS AFFORDED COMPLETELY. TO PRECLUDE PETITIONER FROM THEREAFTER ASSERTING HIS OWN COMMON LAW RIGHTS BY REASON OF THE OVERBEARING SHADOW OF ROE CONSTITUTED EXTREME COMPULSIVENESS FROM ROE UPON THE WISCONSIN COURT, NOT JUSTIFIABLE EITHER UNDER THE FACTS OF THE CASE NOR WITHIN THE PARAMETERS OF THE PRONOUNCEMENT OF ROE.[21] This compulsion with the interwoven state and federal grounds provides the United States Supreme Court with jurisdiction.

CONCLUSION

It is deservant that the United States Supreme Court grant the petition and enunciate what states may or may not do to protect unborn life under the shadow of Roe,

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21. The privacy right did not carry with it any inherent or other guarantee that the abortion must be successful, but only that the procedure would be freely available. That the procedure failed in petitioner's case in no way infringes upon the mother's right to access such procedure, and should not, similarly, infringe upon petitioner's common law rights for prenatal tort recovery, which came into being the moment the abortion procedure was concluded.

and establish the accommodation of such rights under Roe. As the Court has stated in Planned Parenthood of Southeastern Pennsylvania v. Casey ___U.S.___ , 120 L.ed. 2d 674, 112 S. Ct. 2791(1992) at 120 L.ed. 2d 711:

> "...it must be remembered that Roe v.Wade speaks with clarity in establishing not only the woman's liberty interest, but also the state's important and legitimate interest in potential life. That portion of the decision in Roe has been given too little acknowledgement and implementation by the Court in its subsequent cases."

This case provides the Court with that opportunity to acknowledge and implement that part of Roe establishing the state's important and legitimate interest in potential life.[22] Accordingly, it is prayed that the petition for writ of certiorari be granted.[23]

August 30, 1993

Respectfully,

S.A. Schapiro
Attorney for Petitioner

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22. The state's interest in fashioning its own tort law is paramount to any federal interest. Martinez v. California 444 U.S. 277, 62 L.ed. 2d 481, 497, 100 S. Ct. 553 reh. den. 445 U.S. 920, 63 L.ed. 2d 600, 100 S. Ct. 1285(1980).

23. Petitioner cross appealed to the state court of appeals. None of the issues raised in this petition touch on the matters dealt with in the cross appeal, and the petition does not concern the cross appeal.

APPENDIX

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MAY 18, 1993

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT 1

Case No. 91-0982

JOSHUA VANDERVELDEN,

Plaintiff-Respondent-
Cross Appellant,

v.

BENJAMIN VICTORIA, M.D.,

Defendant-Appellant-
Cross Respondent

APPEAL and CROSS-APPEAL from a judgement of the circuit court for Milwaukee county: RUSSELL W. STAMPER, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

WEDEMEYER, P.J. Benjamin Victoria, M.D., appeals from a judgement entered on March 29, 1991, in favor of Joshua Vandervelden (Joshua) for $1,146,516.88, following a jury trial where it was found that Dr. Victoria had committed a battery against Joshua during the time period in which Joshua was a fetus. Dr. Victoria asserts that the trial court erred by allowing the case to proceed to trial on the basis of a battery claim.

Joshua cross-appeals from the part of the judgement where it was stipulated between the parties that "the Court of Appeals shall cause the destruction of the tapes upon its completion of their use unless the matter is further appealed to the Wisconsin Supreme Court." Joshua argues that the stipulation should be disregarded and the videotapes preserved as a public record.

Because the trial court erred in allowing the case to proceed to trial on the basis of a battery claim, we reverse the $1,146,516.88 judgement in favor of Joshua. Because the stipulation between the parties concerning the videotapes has binding effect, we affirm that part of the judgement that calls for the videotapes to be destroyed after time for appeal has expired.

1. APPEAL

A. Background

On January 10, 1979, the plaintiff's mother, Linda Noie, then six-to-eight weeks pregnant with plaintiff, went to the Fox Valley Reproductive Health Care Services to obtain information about an abortion. Brian Rusch, the father of the child, accompanied her. The couple met with a counselor at Fox Valley who discussed the procedure with them.

Two days later, on the morning of January 12, 1979, Ms. Noie and Mr. Rusch returned to the clinic.. The couple had discussed the matter amongst themselves and had decided that an abortion was the most appropriate option. Ms. Noie read and signed the required medical consent forms. Several hours later, Dr. Victoria performed the abortion procedure.

Subsequently, Ms. Noie learned that the abortion procedure had not been successful. On September 18, 1979, Ms. Noie gave birth to Joshua. Because there was some indication of fetal distress and because the attempt to induce natural labor was unsuccessful, Joshua was delivered via caesarean section. Joshua was placed on a respirator and remained

in the hospital fourteen days before being discharged.

On February 28, 1989, Joshua filed a complaint against Dr. Victoria in which he claimed battery. Joshua alleged that he had been injured by the unsuccessful abortion procedure performed upon his pregnant mother while he was a fetus of six-to-eight weeks' gestational age. The compliant sought compensatory damages for hearing loss and alleged brain damage.[1] The complaint also sought punitive damages for Dr. Victoria's conduct.

Dr. Victoria filed an answer denying the allegations of battery. The answer also set forth several affirmative defenses, including the defenses that Ms. Noie had consented to the procedure and that Joshua had failed to comply with the mediation requirements of ch. 655, Stats. In response, Joshua filed a motion to strike Dr. Victoria's affirmative defenses. Dr. Victoria also filed a motion seeking summary judgment based on the affirmative defenses as pled.

On June 26, 1989, the trial court held a hearing on the

1. There is not dispute that Joshua suffers from hearing loss in his left ear. There is dispute, however, as to the cause and the extent of the hearing loss. Both sides also agree that there is an asymmetry in the later ventricles of Joshua's brian. The parties disagree, however, as to whether that asymmetry falls within the normal range of variation or whether it is abnormal.

motions. The trial court found that as a fetus, Joshua had failed to consent to the abortion procedure and that the mother's consent, therefore, could not serve as the basis for an affirmative defense: "The consent given by the mother was not the consent to batter. It was consent to abort. The child, in any given event, gave neither consent to batter, nor consent to abort." The trial court also found that the case was not governed by ch. 655 because there were no allegations of negligence.

The case proceeded to trial on January 14, 1991. At the close of the testimony, the trial court instructed the jury as follows:

A battery is the unlawful and intentional use of force upon the person of another, resulting in the infliction of physical harm to such other. The use of force or violence in any degree upon the person of another is unlawful when no permission for the bodily contact has been given by the person upon whom such force or violence has been committed. A fetus is a person.

The jury found Dr. Victoria guilty of committing a battery

and awarded Joshua $25,000 for future medical expenses, $300,000 for loss of earning capacity and $800,000 for past and future pain, suffering and disability. Dr. Victoria's post-verdict motions were denied and he now appeals.

B. Discussion

This case presents an issue of first impression in Wisconsin. The issue can be summarized as follows: whether a physician who performs an unsuccessful abortion procedure on a non-viable fetus can be held liable for a battery against the unborn fetus where the mother has freely and fully given her consent to the abortion procedure.

Dr. Victoria argues the only consent a physician need obtain before performing an abortion or any other medical procedure on a pregnant woman is that of the woman herself. Accordingly, Dr. Victoria requests this court to hold that a child injured *in utero* as a result of medical procedure performed with its mother's consent cannot obtain recovery based on a battery theory, but rather, must plead and prove negligence by the physician. We agree.[2]

2. As an initial matter, both sides agree that an abortion performed before "viability" is not a crime under Wisconsin law. *See* sec. 940.15(2), Stats. "Viability" is defined as being "that state of fetal development

As defined in the Wisconsin Civil Jury Instructions, a battery is:

the unlawful and intentional use of force upon the person of another, resulting in the infliction of physical harm to such other. The use of force or violence in any degree upon the person of contact has been given by the person upon whom such force or violence has been committed.

Wis J I--Civil 2005. Thus, to establish that a battery has occurred a plaintiff must establish the following three elements: (1) an unlawful use of force or violence upon another; (2) the intentional direction of such force or violence at the person of another; and (3) bodily harm sustained on the part of the person against whom such force or violence is directed. *Id. See also* ***Vosburg v. Putney***, 80 Wis. 523, 527-28, 50 N.W. 403, 403-04 (1891).

In the present case, Joshua has failed to satisfy the first element of a battery–that of unlawful contact by Dr. Victoria. Neither party disputes the fact that Ms. Noie gave her consent

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2. (Continued)
when, in the medical judgement of the attending physician based on the particular facts of the case before him or here, there is a reasonable likelihood of sustained survival of the fetus outside the womb. with or without artificial support." Section 940.15(1), Stats.

for the medial procedure performed by Dr. Victoria. Both parties also agree that the abortion procedure in the present case, although unsuccessful, was a legal procedure. Further, Dr. Victoria, at the time of the procedure, was a fully licensed physician in Wisconsin. Because Ms. Noie consented freely and without coercion to the procedure, and because Dr. Victoria did not exceed the scope of that consent, as a matter of law there can be no finding that Dr. Victoria unlawfully contacted the fetus. Thus, the intentional tort of battery is not an appropriate basis upon which to consider the actions of Dr. Victoria.[3]

As noted earlier, the trial court found that the consent of Ms. Noie was irrelevant to the consent of the fetus. Thus, the trial court implicity concluded that a fetus must independently give its consent to a medical procedure to which the mother has already consented.[4] Absent such independent fetal con-

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3. Presently, in Wisconsin, for an abortion procedure to comply with the law, the legislature has recognized that a physician need only obtain the consent of the pregnant woman. Section 146.78(3), Stats. Although not in existence at the time of the abortion procedure in the present case, this statute nonetheless supports our holding that only a mother need consent to an abortion procedure.

4. As noted by Dr. Victoria, New York and Illinois courts have recently concluded that a pregnant woman has the right to consent to a medical procedure on behalf of herself and her fetus. In *Hughson v. St. Francis*

sent, by the trial court's theory, if the fetus survived to birth and was subsequently found to be injured, he or she would be entitled to compensation for the injuries. Even ignoring the logistical problems that such a "fetal consent requirement" creates, the proposition has no basis in the law.[5]

In reaching its conclusion that a fetus was entitled to

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4. (Continued)
Hospital, 459 N.Y.S. 2d 814 (N.Y. App. Div. 1983), a malpractice action against a physician for prenatal injuries based on a failure to obtain the informed consent of the mother, the court stated:

> A child is not legally competent to give binding consent to any medical services rendered to his or herself. It is the parent who gives effective consent, notwithstanding that it is the child who is the "patient". Perforce, a fetus or infant in utero is also unable to give legal consent, much less, as a practical matter, any consent at all. It is the pregnant mother to whom we must look.

Id. at 817 (citation omitted).

In ***Roberts v. Patel***, 620 F. Supp. 323 (N.D. Ill. 1985), also a malpractice action for prenatal injuries, the court held that a fetus' mother has the right to consent to treatment on behalf of the fetus. "This court is at loss to say who may consent to the treatment of an unborn fetus if not the unborn fetus' parent." *Id.* at 324.

5. If we were to uphold the decision of the trial court, we would essentially be creating a "fetal consent requirement." The question then arises as to who could give consent on behalf of the fetus. The appointment of a guardian ad litem is a possibility. However, the problems associated with a guardian appointment are readily apparent. Who would select the guardians? Who would review the selection process? What rights would the guardian be assessing? Would personal beliefs on the abortion issue be considered in the selection process? Clearly, a fetal consent requirement could create extremely cumbersome situations. Further, such a requirement would infringe upon a woman's constitutional right to obtain an abortion.

maintain a battery action for an unsuccessful abortion procedure, the trial court relied on two principle sources: *Art* 1, sec. 9, of the Wisconsin Constitution and *Puhl v. Milwaukee Automobile Ins. Co.,* 8 Wis 2nd 343, 99 N.W. 2d 163 (1959). We find neither source persuasive in the present context.

First, the trial court found that the fetus, a person, was constitutionally entitled to redress for the wrong committed by Dr. Victoria. Article I, sec. 9-the "remedy for wrongs" provision of the Wisconsin Constitution-states:

> "Every person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property, or character; he ought to obtain justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay, conformably to the laws."

As an initial matter, we note the fact that the trial court referred to the nonviable fetus in this case as a "person." We know of no court that has found a fetus of less than three months gestational age to be considered as a person entitled to legal protection. This finding runs counter to the United States Supreme Court's ruling in ***Roe v. Wade***, 410 U.S. 113, 158 (1973) ("All this . . . persuades us that the word 'person,'

as used in the Fourteenth Amendment, does not include the unborn"). Furthermore, sec. 9 does not–the trial court's implication to the contrary notwithstanding–*create* any legal rights, but rather, guarantees access to the courts to enforce *existing* rights. ***See Mulder v. Acme-Cleveland Corp.,*** 95 Wis 2d 173, 189-90, 290 N.W. 2d 276,284 (1980). To allow a battery action in the present case would be to create a right not in existence in Wisconsin Law.

Puhl presented the issue of whether a plaintiff could assert a *negligence* claim for injuries suffered in an automobile accident while she was a nonviable fetus. *See* ***Puhl,*** 8 Wis 2d at 351, 348, 99 N.W. 2d at 168, 166. The Wisconsin Supreme Court held that the plaintiff had failed to prove causation and affirmed the trial court's dismissal of her case. *Id.* at 354, 99 N.W. 2d at 169. The ***Puhl*** court never considered the question of a fetus' lack of consent to a medical procedure. Thus, its application in the present case is of no help in our decision-making process.

In conclusion, where a woman has freely consented to an abortion procedure on a non-viable fetus, a physician may not

be held liable for a battery to the unborn fetus. Negligence law, not battery law, provides the appropriate basis for determining physician liability where the plaintiff alleges that the physician improperly performed a medical procedure.

II. CROSS-APPEAL

A. Background

On March 5, 1990, Joshua moved the trial court to allow videotaping of the trial. The trial court granted the motion. On the second day of trial, however, the trial court prohibited further taping when it was discovered that the taping was being conducted by an anti-abortion group, Wisconsin Right to Life. The trial court stated:

> "I ordered such permission over the objection of the defense. It was my understanding at that time that the tape would be used for the purpose of the Appeals Court's review, and now ti has been brought to my attention that this tape is to be done pursuant to a contract between the taping company, TV 3, WVCR, and Wisconsin Right to Life, and it's my opinion that, and I'm informed that, Wisconsin Right to Life is an anti-abortion organization.
>
> It's my suspicion that Wisconsin Right to Life would make some use of this tape after the appellate process, but the use I suspect would

> be to further or advance a point of view, that point of view being in the nature of a hostility to abortions. This Court does not want to participate or be a factor in such a propaganda. I am not commenting on my position on the issue of abortion. That position is not relevant. What is relevant is whether or not this Court becomes a participant in the furtherance of a point of view, either pro or hostile, to abortion, and I am not willing to permit this Court to be so used.

Joshua objected to the ruling, arguing that it prejudiced his ability to ask this court to review the credibility of the witnesses. Joshua further argued that the trial court had the ability to control the tape and thus prevent any misuse. The trial court agreed, pursuant to the following stipulation:

> THE COURT: First, there shall be one original tape.
>
> Secondly, daily that original tape shall be left with this Court at the end of the workday.
>
> Thirdly, at the close of this trial, the tapes produced shall be left in the custody of this Court and [are] to be turned over the Court of Appeals if there is an appeal by the plaintiff, otherwise

destroyed.

Fourthly, there shall be no attempt by any party to obtain the production of this tape or these tapes pursuant to the open records law or any other law now in existence or that will come into existence in the future; and,

Fifthly, the parties agree to resist any attempt by any third party to obtain the production of these tapes by any means, including the open records law. By resistance, I mean their position; they will not stipulate to any production.

Did you hear and understand that, Mr. Schapiro?

MR. SCHAPIRO: Judge, on behalf of Joshua Vandervelden, I will agree to those conditions.

THE COURT: All right , and Ms. Hansen?

MS. HANSEN: I understand, Your Honor.

After the plaintiff prevailed at trial, Dr. Victoria moved the trial court for an order that the tapes be destroyed. In

responding to the motion the following discussion occurred:

> THE COURT: The only way that this videotape is not destroyed is that Mr. Schapiro appeals.
>
> MS. HANSEN: Right, if he does not appeal then the video is destroyed.
>
> MR. SCHAPIRO: I have no objection to the destruction of the video after the time for appeal.

During the pendency of this appeal, Joshua has filed two request with this court to obtain the videotape in question. Both requests were denied. He now requests that we rule that the videotape is a public record and should be accessible to any and all parties.[6]

B. Discussion

Section 807.05, Stats, governs the appropriate procedures to be followed regarding stipulations and reads as follows:

> No agreement, stipulation, or consent between parties or their attorneys, in respect to the proceedings in an action or special proceeding shall be binding unless made in court. . . and entered

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6. It should be noted that only Joshua objects to the destruction of the videotape.

> in the minutes or recorded by reporter, or made in writing and subscribed by the party to be bound thereby or the party's attorney.

As noted by this court, "[t]he only way to give sec. 807.05 meaning is to enforce its terms." *Marks v. Gohlke*, 149 Wis. 2d 750, 753, 439 N.W. 2d 157 (Ct. App. 1989)

In the present case, Joshua, through his attorney, agreed to the destruction of the videotape following trial or upon resolution of any appeals. As noted from the above quoted trial court passage, Joshua expressly agreed that he would not attempt to obtain production of the videotape "pursuant to the open records law or any other law not in existence or that will come into existence." Allowing Joshua to renege on his promise would be to thwart the legislature's directive that stipulations between parties are binding. Here, the stipulation was clear, made in open court, and accepted by all the parties. Section 807.05, Stats., has been fully complied with and, therefore, the effect of the stipulation is binding. After the time for appeal has expired, the videotape, pursuant to stipulation,

will be destroyed.[7]

By the Court. - Judgment affirmed in part; reversed in part and cause remanded with directions.

Recommended for publication in the official reports

7. Dr. Victoria also argues that Joshua's cause of action is frivolous under sec. 814.025(3), Stats. Joshua counterclaims that Dr. Victoria's defense based on frivolousness is itself a frivolous claim. We conclude that neither party has presented a frivolous claim. Therefore, all requests for sanctions based on frivolousness are hereby denied.

STATE OF WISCONSIN

CIRCUIT COURT
Branch No. 9
MILWAUKEE COUNTY

JOSHUA VANDERVELDEN,
Plaintiff

Case No. 89-CV-02807

DECISION

v.

BENJAMIN VICTORIA, M.D.,
Defendant

Proceedings held before the
Honorable RUSSELL W. STAMPTER
Circuit Court Judge, presiding
June 26, 1989

EXCERPTS FROM PROCEEDINGS:
(The following is a transcript of the Court's decision).

THE COURT: All right. I look at this case from the standpoint of the plaintiff, the child who is bringing the action, and the question is, whether or not this child is entitled to a remedy. And the Wisconsin Constitution, Article 1, Section 1, provides for the availability or entitlement of a remedy for everyone that's been wronged, and the case law – the case cited by plaintiff in his brief State ex rel Wickman vs. Nygaard, N-y-

g-a-a-r-d, at 159 Wis. 393, and, secondly, the Puhl case, which also has been cited, says: An unborn infant has a right to sue against a tort-feasor anytime after conception. You have to be born. Once you're born, you have a – you have a legal right to sue. And the child has been born and has suffered injuries. So the child is entitled to some redress for these injuries.

The consent given by the mother was not consent to batter. It was consent to abort. The child, in any event, gave neither consent to batter, nor consent to abort.

As to whether or not Chapter 655 is applicable here, turns on,seems to me, the question of whether or not the patient – the plaintiff was a patient. Plaintiff is not a patient. The mother was the patient. "Patient" is defined in 655.001(10). "'Patient' means an individual who received or should have received health care services from a health care provider." This plaintiff was receiving, perhaps, the opposite of health care services, attempt to abort or, as some people might say, take the life or kill the fetus. There was not attempt to provide health care services, and, therefore, this fetus was not a patient.

In addition, 655.007 calls for any patient having a claim for injury or death on account of malpractice to be subject to this chapter. Malpractice, as counsel for the plaintiff has pointed out, has to do with negligence. This is not a negligence case. Again, this is not a malpractice case. Therefore, again, this is not a Chapter 655 case.

And, finally – so I will strike the third affirmative defense.

Finally, plaintiff has successfully plead a battery claim in my opinion. So the final defense alleging frivolousness is also stricken.

What happens is that if the physician is unsuccessful in aborting the child, then he runs the risk of creating a claim. The mother is only, perhaps, a co-actor or an accomplice in this battery, but her consent is not significant.

As the Court said in the Puhl case at Page 356:

> Injuries suffered before birth impose a conditional liability on the tort-feasor. The liability becomes unconditional or complete upon the birth of the injured separate entity as a legal person. If such personality is not achieved, there would be no liability because of no damage to a legal person.

That being born, the child becomes a legal person.

The Court also goes on to discuss other things in that case. The rights of unborn infants were recognized as protected in criminal law and property law. Court went on to raise the question at Page 357 of whether property rights having to do with wills and inheritances, et cetera, should be more important than the right to be compensated for being born deformed or injured through the negligence of another. Therefore, we aren't talking about negligence here. We are talking about intentional tort, which is more egregious than mere negligence. So strike the consent defense.

I will sign an order to that effect, Mr. Schapiro.

STATE OF WISCONSIN: CIRCUIT COURT

MILWAUKEE COUNTY

89 CV 2807

JOSHUA VANDERVELDEN,
Plaintiff

vs.

BENJAMIN VICTORIA,
Defendant

COMPLAINT

Comes now the plaintiff who complains as follows:

1. Plaintiff is a minor resident of the City of Appleton, Outagamie County Wisconsin residing at 3808 N. Gillette Ave., Appleton.

2. Defendant is a physician residing at an unknown address with offices at 740 N. Plankinton Ave., Milwaukee, Wisconsin.

3. That on January 12, 1979, when plaintiff was sui juris in the uterus of his mother, the defendant wantonly and wilfully assaulted the plaintiff and committed a battery upon him, causing him severe and permanent injuries.

4. That as a result of said assault and battery, the plaintiff has suffered pain, an impairment of his earning capacity, and verily believes he will incur future medical expenses for the rest of his life.

5. That as a result of the foregoing plaintiff demands compensatory and punitive damages against the defendant.

WHEREFORE plaintiff demands judgement against defendant for compensatory and punitive damages.

PLAINTIFF DEMANDS TRIAL BY JURY OF 12.

S.A. SCHAPIRO
ATTORNEY FOR PLAINTIFF

STATE OF WISCONSIN: CIRCUIT COURT:
MILWAUKEE COUNTY

89 CV 2807

JOSHUA VANDERVELDEN,
Plaintiff

VS.

BENJAMIN VICTORIA,
Defendant

NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGEMENT

PLEASE TAKE NOTICE that the undersigned will bring the above motion on for hearing before the HONORABLE RUSSELL W. STAMPER, Circuit Judge, on the 5th day of September, 1989, at 10 o'clock a.m., or soon thereafter as counsel can be heard.

This motion for summary judgement is based on the provisions of Wis. Stats. Sec. 802.08 and that the pleadings and depositions, together with the affidavits show that there is no genuine issue as to any material fact, and that the defendant is entitled to judgement as a matter of law.

Dated at Milwaukee, Wisconsin this 23rd day of June, 1989.

Riordan, Crivello, Carlson
& Mentkowski, S.C.

By.
LINDA E.B. HANSEN

P. O. ADDRESS:
710 North Plankinton Avenue
Milwaukee, Wisconsin 53203
(414) 271-7722

RESPONDENT'S CONSTITUTIONAL ARGUMENT IN THE TRIAL COURT

A. The Law Does Not Permit A Requirement of Fetal Consent Prior To Abortion.

Wisconsin courts have historically recognized that a surgical operation performed without the consent of the patient, either express or implied, and without justification by reason of emergency, constitutes a technical assault. Paulsen v. Gundersen, 218 Wis. 578, 583, 584, 260 N.W. 448(1935), Suskey v. Davidoff, 2 Wis. 2d 503, 505, 87 N.W. 306(1958). More recently, the court has extended the duty to obtain consent, and required that the consent be informed. Lack of informed consent is therefore a technical assault. Trogun v. Fruchtman, 58 Wis. 2d 569, 207 N.W. 2d 297(1973).

The plaintiff's claim in this lawsuit is that Dr. Victoria failed to obtain the consent of the plaintiff, the alleged fetus, prior to performing the abortion procedure. This fails for several reasons: the patient, Linda Vandervelden, who had an absolute right to the abortion, gave consent for the procedure; as a fetus, Joshua Vandervelden, was not competent to give informed consent for any medical procedure, and no require-

ment of fetal consent would withstand scrutiny under the United States Constitution.

Linda Vandervelden signed a consent for the abortion procedure. The consent was signed prior to the performance of the abortion procedure. Further, the fact that Linda Vandervelden wished the procedure to take place, and understood the expected outcome of that procedure can be seen by virtue of the fact that she later sued Dr. Victoria for failure to successfully perform that procedure, and asked that he be required to pay the expenses of raising the plaintiff in this matter.

A woman's right to an abortion was found to be guaranteed by the United States Constitution in 1973 when the United States Supreme Court decided Roe v. Wade, 410 U.S. 113(1973). The court there held that the right to abortion was guaranteed by the constitutional right of privacy. The court stated "this right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." id. 410 U.S. at 153.

Pregnant women have been recognized as having an

absolute constitutional right to have an abortion performed for any reason at all or for no reason, during the first trimester of a pregnancy. See Planned Parenthood Assn. v. Ashcroft, 462 U.S. 476(1983); Roe v. Wade, supra.(1973). In Roe v. Wade, id., the Supreme Court declared state statutes proscribing abortions in the first trimester unconstitutional. The court there held that until a fetus becomes viable, the interest of the State in the life or potential life it represents is outweighed by the interest of the mother in choosing whether or not to terminate her pregnancy. 410 U.S. at 153. In balancing these interests, the Court stated: "the unborn have never been recognized in the law as persons in the whole sense." 410 U.S. at 161-162.

Following the decision in Roe v. Wade, the Supreme Court was asked to determine the constitutionality of a law requiring the consent of the spouse of a woman desiring an abortion before the procedure could be done. The Court, in Planned Parenthood of Missouri v. Danforth, 428 U.S. 52, 491 L.ed. 788, 96 S. Ct. 2831(1976) held that any law requiring a pregnant woman to obtain the consent of her husband before

obtaining an abortion was unconstitutional.

The court in Danforth quoted the lower court in explaining the rationale behind its decision:

> ". . .the state cannot 'delegate to a spouse a veto power which the state itself is absolutely and totally prohibited from exercising during the first trimester of pregnancy. 392 F. Supp. at 1375. Clearly, since the State cannot regulate or proscribe abortion during the first stage, when the physician and his patient make that decision, the State cannot delegate authority to any particular person, even the spouse, to prevent abortion during that same period. . . . [We] cannot hold that the State has the constitutional authority to give the spouse unilaterally the ability to prohibit the wife from terminating her pregnancy, when the state itself lacks that right.'" Danforth, 428 U.S. at 69 (emphasis added).

The Court in Danforth extended its holding to prohibit anyone from restricting a pregnant woman's right to obtain an abortion when it held that "the State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent." id., 428 U.S. at 74.

The court in Roe v. Wade held that a pregnant woman has

an absolute right to terminate her pregnancy. There was no issue as to whether or not the fetus had the right to object to the surgery, or whether the physician needed the consent of the fetus prior to performing the surgery. The reason for this is obvious. A fetus has no ability to consent or refuse to consent to anything.

The only consent required prior to medical treatment is the consent of the patient, or in the case of a minor, or person who because of incapacity cannot give consent, the consent of the parent or guardian. Linda Vandervelden was not a minor at the time of the abortion procedure, and there has been no allegation that her consent was not valid, or could not be relied upon by Dr. Victoria.

The U.S. Supreme Court has stated that no restrictions can be placed on a woman's right to obtain an abortion during the first trimester of her pregnancy. The plaintiff is asking the court to do otherwise.

According to the plaintiff, this court should impose a restriction – retroactively – on a woman's right to obtain an abortion during the first trimester of a pregnancy. The plaintiff

argues that a physician must obtain the consent of the fetus prior to performing an abortion. Not only is this impossible, but when the plaintiff's argument is carried to its logical conclusion, further absurd results are obtained.

If, as plaintiff suggests, the consent of a fetus is required before a physician can perform a legal abortion on a woman who has consented to the procedure, the consent of a fetus should be obtained prior to other medical procedures which may affect it. Plaintiff's argument would require the consent of the fetus for amniocentesis, ultrasound, and the use of many medications by the mother. Under plaintiff's theory, a critically ill pregnant woman would be unable to receive any medical treatment that might affect the fetus, because she would be unable to obtain the fetus' consent.

Further, if the consent of a fetus is required before any medical procedure can be performed which may affect it, the consent of a child should be required prior to the performance of any medical procedure which may affect his or her health. It makes not sense to require the consent of the unborn and not require consent of a child who has been born. If, as plain-

tiff suggest, the consent of the mother is not sufficient for a physician to treat an infant.

The result of plaintiff's theory would be that no infant could be treated by a physician in any manner that could affect the life and health of the infant. A newborn with a heart defect could not undergo surgery; an infant with a hydrocephalic condition could not have shunt surgically implanted; and not child could be immunized against pertussis, because there is a risk of severe injury, as well as death, associated with each.

As the court recognized in Roe v. Wade, and Danforth, no restrictions may be placed on a woman's right to an abortion in the first trimester of a pregnancy. The plaintiff may not require that the restriction of fetal consent be placed on that right. To find otherwise would be inconsistent with previous decisions of the U.S. Supreme Court. Further, it would require an impossibility – that is, that the physician in In the Matter of Beverly Requena, 517 A 2d 866, 213 N.J. Super. 475(1986), in the case of abortion, "the fetus does not in any sense consent to what is done to it." Plaintiff's theory would thus mean that all abortions would be improper as not fetal

consent could be obtained.

A woman who was pregnant as a result of rape and a young girl pregnant as a result of incest would be unable to have an abortion because they wouldn't be able to obtain the informed consent of the fetus. A woman who was advised by her physician that she would die if she tried to carry the fetus to term would also be unable to get an abortion because she wouldn't be able to get the consent of the fetus for the abortion.

There is no statute that requires a physician to obtain the consent of a fetus prior to performing an abortion. At common law, it was generally believed that the unborn child was physically part of the mother and legal personality was accorded to it merely as a fictional device in anticipation of birth. See Roe v. Wade, supra. Dr. Victoria's actions violated neither statutory nor common law. Even if the law were to be changed now, that would not apply retroactively to Dr. Victoria in 1979.

Another anomaly which would result from plaintiff's argument is that a physician who successfully terminated a pregnancy could not be found liable for failing to obtain the con-

sent of the fetus because there would be no one to sue the physician, but a physician who did no harm to a fetus while attempting an abortion could be found liable to a healthy child. In other words, the physician would be liable for failing to injure a fetus, and would not be liable for killing it. This cannot be what the law requires.

CONSTITUTIONAL PROVISION

AMENDMENT 1:

Congress shall make not law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT 4:

The right of the people to be secure in their persons, houses papers and effects, against unreasonable searches

and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported the place to be searched, and the persons or things to be seized.

AMENDMENT 5:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject fort he same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, not be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT 9:

The enumeration in the Constitution or certain rights shall not be construed to deny or disparage others retained by the people.

AMENDMENT 14: (irrelevant parts omitted)

Sec. 1 . . .No state shall. . .deprive any person of life liberty or property without due process of law. . .

RESPONDENT'S ARGUMENT ON FEDERAL CONSTITUTIONAL ISSUE IN STATE COURT OF APPEALS

III. REQUIRING FETAL "CONSENT" TO AN ABORTION VIOLATES A WOMAN'S ABSOLUTE CONSTITUTIONAL RIGHT TO CHOOSE WHETHER TO HAVE A FIRST-TRIMESTER ABORTION.

The plaintiff's battery theory is untenable not just a matter of common law and not just as a matter of public policy. It also cannot be reconciled with a woman's constitutional right to determine, without any third-party's approval or consent, whether to have an abortion during the first trimester of pregnancy.

In Roe v. Wade, 410 U.S. 113, 153(1973), the U.S. Supreme Court recognized that the constitutionally protected right of privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." During

the first trimester – the stage at which Dr. Victoria performed the abortion procedure on the plaintiff's mother – the Court held, "the abortion decision and its effectuation" could not be regulated by the state but "must be left to the medical judgment of the pregnant woman's attending physician." Id. at 164.

Roe did not directly address the issue of third-party consent to an abortion. Following Roe, however, the Court invalidated other state statutes that required the consent of someone other than the pregnant woman to terminate a pregnancy. In Planned Parenthood of Cent. Missouri v. Danforth, 428 U.S. 52(1976), the Court held unconstitutional a Missouri statute that required a married woman to secure the prior written consent of her husband before obtaining an abortion. The Court held that the state could not delegate a veto power to any third party that could prevent a woman from exercising her right to a first trimester abortion. Id at 69. This Court subsequently recognized the right of a pregnant woman to obtain an abortion without the consent of her spouse when it held that a husband has no claim against his wife for intentional infliction

of emotional distress as a result of her decision to abort her nine-week fetus. Przbyla v. Przbyla, 87 Wis. 2d 441, 275 N.W. 2d 112(Ct. App. 1978).

Under Roe and Danforth, therefore, it is unconstitutional to give any person the unilateral right to veto a pregnant woman's decision, made in consultation with her physician, to terminate a pregnancy during the first trimester. The plaintiff's battery theory gives just such a veto power to the fetus itself.[5]

Even if Roe v. Wade and its progeny were reversed outright in some future case, ti would not affect the outcome of this case. The rights and responsibilities of the parties must be evaluated as of the time the plaintiff's mother sought an abortion in 1979. There can be not question that at the time, the plaintiff's mother had the unqualified constitutional right to obtain a first-trimester abortion without obtaining the consent of any other individual and that Dr. Victoria's conduct was lawful.

---

5. The plaintiff argued in the trial court that the Supreme Court's recent decision in Webster v. Reproductive Health Services, 492 U.S. 490(1989), "discarded" Roe v. Wade's trimester analysis and gave the states the authority to regulate abortion "from conception onwards." R. 88:2, 11. That portion of the Webster decision on which the plaintiff relies, Part II-D, was the plurality opinion of Chief Justice Rehnquist, joined only by Justices White and Kennedy.

Supreme Court, U.S.
FILED
SEP 30 1993
OFFICE OF THE CLERK

No. 93-379

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

JOSHUA VANDERVELDEN,
Petitioner,
v.
BENJAMIN VICTORIA, M.D.,
Respondent.

On Petition for a Writ of Certiorari to the Wisconsin Court of Appeals

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The Petition does not present any questions that are appropriate for review by this Court pursuant to a writ of certiorari.

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

The facts and procedural history of this case are discussed thoroughly in the Wisconsin Court of Appeals' decision. Petitioner's Appendix ("Pet. App.") at 4a-7a. On January 10, 1979, petitioner Joshua Vandervelden's mother, Linda Noie, then six to eight weeks pregnant with the petitioner, went to the offices of Fox Valley Reproductive Health Care Services to obtain information about an abortion. Two days later, Ms. Noie returned to the clinic and signed the required consent forms for an abortion. Several hours later, the respondent, Dr. Benjamin Victoria, performed an abortion procedure.

Ms. Noie subsequently learned that the abortion procedure had not been successful. On September 18, 1979, after a difficult labor, Ms. Noie gave birth to Joshua.

Joshua suffers from a hearing loss in his left ear, first detected when he was four years old, which he attributes to the unsuccessful abortion. He also claims to have an asymmetry in the lateral ventricles of his brain, which he attributes as well to the abortion procedure.

On February 28, 1989, when he was nine years old, Joshua filed this civil action against Dr. Victoria, alleging that the abortion procedure constituted a battery. Dr. Victoria moved for summary judgment dismissing the claim, asserting among other defenses that Ms. Noie's consent precluded any action based on a battery theory. The trial court rejected that argument, holding that the mother's consent was not sufficient as a matter of law because "[t]he child . . . gave neither consent to batter, nor consent to abort." Pet. App. at 6a.

The case proceeded to a jury trial on January 14, 1991. The trial court instructed the jury that, under Wisconsin law, a battery is the unlawful use of force upon the person of another, that the use of force is unlawful when no permission for the contact has been given "by the person upon whom such force . . . has been committed," and that a "fetus is a person." *Id.* The jury found that Dr. Victoria had committed a battery and awarded the petitioner over $1.1 million in compensatory damages. *Id.* at 6a-7a.

The Wisconsin Court of Appeals reversed. *Vanderveldden v. Victoria,* 177 Wis. 2d 243, 502 N.W.2d 276 (Ct. App. 1993); Pet. App. at 2a-18a. One of the elements of battery under Wisconsin common law, the court said, is the unlawful use of force upon another. Pet. App. at 8a. The court held that the petitioner had not proved the elements of battery "[b]ecause Ms. Noie consented freely and without coercion to the procedure, and because Dr. Victoria did not exceed the scope of that consent. . . ."

Pet. App. at 8a-9a. "[A]s a matter of law," the court concluded, "there can be no finding that Dr. Victoria unlawfully contacted the fetus." *Id.* at 9a.

The Court of Appeals stated that the trial court had "implicitly concluded that a fetus must independently give its consent to a medical procedure to which the mother has already consented." *Id.* In a footnote, the court noted that such a requirement would create a host of "logistical problems." In that footnote, and there alone, the court mentioned in passing the constitutional right to an abortion.

> If we were to uphold the decision of the trial court, we would essentially be creating a "fetal consent requirement." The question then arises as to who could give consent on behalf of the fetus. The appointment of a guardian ad litem is a possibility. However, the problems associated with a guardian appointment are readily apparent. Who would select the guardian? Who would review the selection process? What rights would the guardian be asserting? Would personal beliefs on the abortion issue be considered in the selection process? Clearly, a fetal consent requirement could create extremely cumbersome situations. Further, such a requirement would infringe upon a woman's constitutional right to obtain an abortion.

Id. at 10a n.5.

The Court of Appeals did not base its decision on those considerations, however. "Even ignoring the logistical problems" identified in the footnote, the court held, the petitioner's theory "has no basis in the law." *Id.* at 10a.

The petitioner and the trial court had relied on two sources to support the battery theory: the "remedy for wrongs" provision of the Wisconsin Constitution, art. I, sec. 9, and the decision of the Wisconsin Supreme Court in *Puhl v. Milwaukee Automobile Ins. Co.*, 99 N.W.2d

163 (Wis. 1959). The Court of Appeals found "neither source persuasive in the present context." Pet. App. at 11a.

Article I, sec. 9, of the Wisconsin Constitution states that "[e]very person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property, or character. . . ." The Court of Appeals questioned whether a nonviable fetus is a "person" within the meaning of that provision, noting that this Court had addressed a similar issue in *Roe v. Wade*:

> As an initial matter, we note the fact that the trial court referred to the nonviable fetus as a "person." We know of no court that has found a fetus of less than three months' gestational age to be considered as a person entitled to legal protection. This finding runs counter to the United States Supreme Court's ruling in *Roe v. Wade*, 410 U.S. 113, 158 (1973) ("All this . . . persuades us that the word 'person', as used in the Fourteenth Amendment, does not include the unborn").

App. at 11a-12a.

But whether or not a fetus is a "person" under art. I, sec. 9, the court said, that provision still provides no basis for the petitioner's claim. Previous Wisconsin Supreme Court decisions held that this constitutional provision does not create any legal rights, but simply guarantees access to the courts to enforce existing rights. *Id.* at 12a. To allow petitioner's battery action, the Court of Appeals concluded, "would be to create a right not in existence in Wisconsin law." *Id.*

Turning next to the asserted common law basis for the petitioner's battery claim, the Court of Appeals found that the Wisconsin Supreme Court's decision in *Puhl v. Milwaukee Automobile Ins. Co., supra,* provided no support for that theory. *Puhl* presented the issue of whether a plaintiff could assert a negligence claim for injuries suffered in an automobile accident while she was a non-

viable fetus. The Court of Appeals found *Puhl* to be "of no help" in this case because the *Puhl* court "never considered the question of a fetus' lack of consent to a medical procedure." *Id.*

The Court of Appeals concluded that under Wisconsin law, "where a woman has freely consented to an abortion procedure on a nonviable fetus, a physician may not be held liable for battery to the unborn fetus." *Id.* at 12a. The court did not rule out the possibility of recovery for prenatal injuries, but held that "[n]egligence law, not battery law, provides the appropriate basis for determining physician liability where the plaintiff alleges that the physician improperly performed a medical procedure." *Id.* at 13a.

The petitioner filed a petition with the Wisconsin Supreme Court seeking discretionary review of the Court of Appeals' decision. The Supreme Court denied that petition on June 16, 1993.

SUMMARY OF ARGUMENT

The petitioner asked the courts of Wisconsin to adopt a theory of tort liability that simply made no sense. He contended that a child who allegedly was injured by an unsuccessful abortion procedure performed with his mother's consent can sue the physician for battery. The Wisconsin Court of Appeals rejected that claim, holding that it "has no basis in the law" of Wisconsin. Pet. App. at 10a.

The petitioner erroneously argues to this Court that the Wisconsin Court of Appeals' decision was "[b]ased primarily on *Roe v. Wade*. . . ." Petition for Writ of Certiorari ("Pet.") at 12. To the contrary, the Court of Appeals' decision applied established principles of Wisconsin law to reject the petitioner's novel theory. The Court of Appeals mentioned *Roe v. Wade* but once, by way of analogy, when it rejected the proposition that a

fetus is a "person" protected by the Wisconsin Constitution.

Notwithstanding the petitioner's repeated assertions to the contrary, the Wisconsin Court of Appeals decided an issue of state tort law by applying established state common law principles and interpreting state constitutional provisions. Regardless of whether the Court of Appeals decided that issue correctly or incorrectly, this Court does not have jurisdiction to review that decision.

REASONS FOR DENYING THE WRIT

I. THE WISCONSIN COURT OF APPEALS' DECISION DOES NOT RAISE ANY FEDERAL CONSTITUTIONAL ISSUES BECAUSE IT IS BASED ON LONG-ESTABLISHED PRINCIPLES OF STATE LAW.

It is a fundamental principle of federal jurisprudence that the United States Supreme Court lacks jurisdiction to review matters of state law. This Court's "only power over state judgments is to correct them to the extent they incorrectly adjudge federal rights." *Ridgway v. Ridgway*, 454 U.S. 46, 54 (1981), quoting *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945). The Wisconsin Court of Appeals' decision did not adjudge federal rights when it rejected the petitioner's state tort law claim. Accordingly, this Court lacks jurisdiction to review that decision.

The petitioner is able to create federal questions in the Court of Appeals' opinion only through a persistent misreading of that decision. The petitioner states that "[b]ased primarily on *Roe v. Wade*, the Wisconsin Court of Appeals gave effect to an argument of the respondent doctor . . . to the effect that petitioner had no pre-natal rights, inchoate or otherwise against said doctor for the injuries he suffered. . . ." Pet. at 12. He is wrong in both respects. The Court of Appeals did not base its decision on *Roe v. Wade* or any other federal grounds,

but on the common law of Wisconsin. Under that common law, moreover, the court found that the petitioner had a remedy for prenatal injuries, but held that his remedy resides in negligence law, not battery.

Roe v. Wade and the constitutional right to an abortion received only a passing mention in the Court of Appeals' decision. The court referred to *Roe* just once in the decision, during its discussion of whether a fetus is a "person" within the meaning of the Wisconsin Constitution's "remedy for wrongs" provision. The court supported its observation that "no court . . . has found a fetus of less than three months gestational age to be a person entitled to legal protection" with a citation to *Roe*. Pet. App. at 11a. Contrary to the petitioner's implication, *Roe* did not "compel" the Court of Appeals to interpret the word "person" in the state constitution to exclude nonviable fetuses. At most, the state court found this Court's construction of the Fourteenth Amendment to provide a useful analogy for interpreting the Wisconsin Constitution.

The Court of Appeals rejected the petitioner's assertion that art. I, sec. 9, of the Wisconsin Constitution provided a basis for his claim, but its decision did not depend on whether a fetus is a "person" under that provision. Applying well-established Wisconsin precedent, the Court of Appeals held that the "remedy for wrongs" provision guarantees access to the court to enforce existing rights but does not create new rights. Pet. App. at 12a. The petitioner's claim, if recognized, would establish a new right. *Id.*

A woman's constitutional right to an abortion is mentioned only once in the Court of Appeals' decision, in a footnote. *Id.* at 10a n.5. That brief mention of the issue, which appears almost as an afterthought, was not the basis of the court's decision, but was merely an example of one of the many problems the court avoided when it

rejected the petitioner's battery theory on state law grounds. "Even ignoring the logistical problems that such a 'fetal consent requirement' creates," the Court said, the petitioner's theory "has no basis in the law." *Id.* at 10a. The court's reasoning was succinct and compelling:

> In the present case, Joshua has failed to satisfy the first element of a battery—that of unlawful contact by Dr. Victoria. Neither party disputes the fact that Ms. Noie gave her consent for the medical procedure performed by Dr. Victoria. Both parties also agree that the abortion procedure in the present case, although unsuccessful, was a legal procedure. Further, Dr. Victoria, at the time of the procedure, was a fully licensed physician in Wisconsin. Because Ms. Noie consented freely and without coercion to the procedure, and because Dr. Victoria did not exceed the scope of that consent, as a matter of law there can be no finding that Dr. Victoria unlawfully contacted the fetus. Thus, the intentional tort of battery is not an appropriate basis upon which to consider the actions of Dr. Victoria.

Id. at 8a-9a (footnote omitted).

Requiring a physician to obtain fetal consent before performing an abortion undoubtedly would violate a woman's constitutional right to obtain an abortion without the consent of a third party.[1] As an alternative to his state law defenses, Dr. Victoria also asserted that constitutional defense in the Wisconsin courts. What the petitioner fails to recognize, however, is that the constitutional defense was not the basis for the Wisconsin Court of Appeals' decision. There is not the slightest hint in that decision that the constitutional defense affected the Wisconsin court's resolution of this case.

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[1] *See, e.g., Planned Parenthood of Cent. Missouri v. Danforth*, 428 U.S. 52, 69 (1976) (spousal consent requirement unconstitutional).

The Wisconsin Court of Appeals rejected the petitioner's theory on Wisconsin state law grounds and on those grounds alone. Accordingly, there is no federal constitutional issue here for this Court to review.

II. BECAUSE THE WISCONSIN COURT OF APPEALS' DECISION RESTS SOLELY ON STATE LAW GROUNDS, THIS COURT LACKS JURISDICTION TO DETERMINE WHETHER THE DECISION IS CORRECT.

Although the petitioner eventually acknowledges that the Wisconsin Court of Appeals' decision "purports" to be based on state law, Pet. at 22, he argues that this Court should review that decision to determine whether it rests on "adequate and independent state grounds." *Id.* Petitioner appears to be arguing that if the Wisconsin Court of Appeals wrongly interpreted state law, it must somehow have based its decision on federal grounds. That plainly was not so. *See* Part I, above.[2]

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[2] The petitioner asserts that the Wisconsin Court of Appeals' conclusion that he had not proven an element of battery cannot provide "an adequate state law ground" because "Wisconsin law is clear, that acts need not be unlawful to be actionable for battery." Pet. at 24. However, the petitioner never argued to either the Wisconsin Court of Appeals or the Wisconsin Supreme Court that unlawful contact is not an element of battery.

Even if the petitioner had not waived this issue, moreover, his contention that unlawful contact is not an element of battery under Wisconsin law is simply wrong. The case he cites for that proposition, *McCluskey v. Steinhorst*, 173 N.W.2d 148 (Wis. 1970), did *not* hold that unlawful contact was not an element of battery. Rather, it held that a plaintiff need not prove unlawful *intent* as an separate element of common law battery, because unlawful intent is inferred as a matter of law from unlawful contact. *Id.* at 152.

As the Court of Appeals' decision explains, unlawful contact has long been an element of common law battery in Wisconsin. Pet. App. at 8a. The court's conclusion that the petitioner failed to prove an essential element of common law battery because there was no unlawful contact provides an independent, adequate and correct basis for rejecting the petitioner's common law claim.

Whether a Wisconsin court correctly interpreted its common law is not a concern of this Court, of course. The petitioner's arguments about the correctness of the Court of Appeals' interpretation of state law were properly addressed to the Wisconsin Supreme Court. That court already has determined that the petitioner's claim does not merit review.

The petitioner apparently believes that this Court's certiorari jurisdiction extends to reviewing state court decisions to determine whether they correctly applied state law. Citing *Ward v. Board of County Comm'rs,* 253 U.S. 17 (1920) and *Howlett v. Rose,* 496 U.S. 356 (1990), the petitioner argues that it is "the province of the United States Supreme Court to inquire whether non-federal grounds put forth in the state court opinion were without any fair or substantial support" and that "[t]he adequacy of a state law ground to support a judgment is itself a federal question." Pet. at 21-22. Neither case establishes such a broad rule.

In both *Ward* and *Howlett,* the state courts rejected on state law grounds claims asserting federal rights. In *Ward,* the Oklahoma Supreme Court rejected a claim by members of the Choctaw tribe that a county had illegally collected taxes on land that was exempt from such taxation by federal law. This Court held that it had jurisdiction to review the case because

> [*t*]*he right to the exemption was a federal right,* and was specifically set up and claimed as such in the petition. Whether the right was denied, or not given due recognition, by the [Oklahoma] Supreme Court is a quesion as to which the claimants were entitled to invoke our judgment. . . .

253 U.S. at 22 (emphasis added).

This Court applied the identical reasoning in *Howlett,* where the Florida Court of Appeal held that a state

sovereign immunity defense was available in an action under 42 U.S.C. § 1983 brought in state court. In rejecting that immunity defense, this Court observed that it had "an independent obligation to ascertain whether a judgment *defeating the enforcement of federal rights* rests upon a valid nonfederal ground. . . ." 496 U.S. at 366 n.14 (emphasis added).

This case, in contrast, does not present a situation in which the Wisconsin courts have denied the enforcement of any federal right. The petitioner based his claim solely on the state common law of battery and the Wisconsin Court of Appeals rejected that claim based solely on state law.[3] Neither *Howlett, Ward,* nor any other decision of this Court give this Court jurisdiction to review a state court decision rejecting a state law claim to determine whether the court properly applied state law.

Nor is this a case in which a state court's decision was based on both federal and state law grounds and this Court must ascertain whether the asserted non-federal ground independently and adequately supports the judgment. *Cf. Michigan v. Long,* 463 U.S. 1032 (1983). The Wisconsin Court of Appeals' decision was based only on state law grounds. Regardless of whether the Wisconsin Court of Appeals correctly decided the state common law issues that were presented, this Court does not have jurisdiction to review this case.

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[3] In the Wisconsin Court of Appeals, petitioner emphasized that this was "a simple common law tort action alleging battery. No federal constitutional issue of the right of privacy upon which the abortion right is founded . . . is presented." Brief of Respondent, *Vandervelden v. Victoria,* No. 91-0982 (Wis. Ct. App.) at 10.

CONCLUSION

This Court has no jurisdiction to do what the petitioner asks. A state court decision based solely on state law grounds should not be reviewed by this Court to determine whether state law was applied correctly. Yet that, in effect, is what the petitioner seeks. Accordingly, the Court should deny the petition for writ of certiorari.

Respectfully submitted,

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Dated: September 30, 1993

Supreme Court, U.S.
FILED
OCT 1 1993
OFFICE OF THE CLERK

(3)

No. 93-379

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1993

JOSHUA VANDERVELDEN
Petitioner

vs

BENJAMIN VICTORIA, M.D.
Respondent

PETITIONER'S REPLY TO RESPONDENT'S ARGUMENT ON PETITION FOR WRIT OF CERTIORARI TO THE FIRST DISTRICT COURT OF APPEALS OF THE STATE OF WISCONSIN

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INTRODUCTION TO PETITIONER'S RESPONSE

Respondent, on both the trial and state appellate levels, urged, based on Roe v. Wade[1], that petitioner had no legal rights as an unborn, in tort or otherwise, against respondent. While the trial court rejected this argument, the state court of appeals upheld it, ruling exactly as respondent argued therein, namely that Roe held petitioner not to be person possessing any legal rights, constitutional or otherwise.

Astonishingly, repondent now argues that there are no federal constitutional issues raised. In discussing state matters, he limits his argument to the battery and state constitutional law matters discussed in the state appellate court.[2]

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1. 410 U.S. 113, 35 L.ed. 2d 147, 93 S. Ct.705(1973)

2. Respondent was silent as to the issue of accomodation being a federal issue giving the Court jurisdiction to grant certiorari. Accomodation, of course, is the central issue presented by the petition.

ARGUMENT

I. THE STATE COURT'S DECISION DID NOT REST ON ANY FAILURE TO PROVE BATTERY, BUT RATHER, ON THE FACT THAT NO CAUSE OF ACTION EXISTS FOR BATTERY IN THE FIRST PLACE, ON BEHALF OF THE UNBORN.

The state court of appeals, beginning its discussion (App. 3a) states clearly why it was reversing:

> "Because the trial court erred in allowing the case to proceed to trial on the basis of a battery claim, we reverse the $1,146,516.88 judgment in favor of Joshua." (Emphasis added)

This statement is pregnant with the conclusion that whether or not a battery was committed was irrelevant, since, even if it were, petitioner had no rights to proceed against the respondent in the first place. The court later explained the issue as one derived from the mother's consent:

> "Whether a physician who performs an unsucessful abortion procedure on a non-viable fetus can be held liable for battery against the unborn fetus where the mother has freely and fully given her consent to the abortion procedure." (App. 7a).

In stating the issue presented before the state court, nothing indicates the issue to be whether a battery was committed in the first place.

Finally, in its concluding remarks (App.13a), the state court said:

> "In conclusion, where a woman has freely consented to an abortion procedure on a non viable fetus, a physician may not be held liable for battery to the unborn fetus."

This statement excludes any supposed failure of proof[3]

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3. Respondent on p. 9, footnote 2 of his response fails to fairly and accurately state petitioner's position as to battery. Respondent there urges that petitioner argues no unlawful contact need be proved as an element of battery. That never has been petitoner's argument. Petitioner's argument always was and still is that unlawful acts need not be shown to establish any intentional tort, including battery, in Wisconsin. As petitioner said on p. 24 of his petition:

> "...Wisconsin law is clear that acts need not be unlawful to be actionable for battery."

This is the essence of the Wisconsin law of battery as applied to physicians. Trogun v. Fruchtman 58 Wis. 2d 569, 207 NW 2d 297(1973). Trogun states, at 207 NW 2d 310:

> "A battery or assault and battery in this state has been defined as an intentional contact with another which is unpermitted."

and cites McCluskey v. Steinhorst, 45 Wis. 2d 350, 357, 173 NW 2d 148(1970) as authority for such rule. Unlawfulness is not a stated element.

of battery as a grounds for reversal. In fact, it assumes for the purposes of the conclusion, that a battery occured and that its occurence was not material to its conclusion. Furthermore, implicit in such conclusion is the fact that the mother was exercising her 1st, 4th, 5th, 9th, and 14th amendment rights in consenting, thereby interweaving the battery ground into the Federal issue.

II. THE STATE CONSTITUTIONAL ISSUE IS NOT AN INDEPENDENT STATE LAW GROUND UPON WHICH TO BASE THE STATE COURT JUDGMENT, AND WAS NO PART OF THE STATE COURT BASES FOR REVERSAL.

A. The state court's state constitutional decision was interwoven with the Roe ruling.

The state court used Roe as the basis why it rejected petitioner's state constituional argument. Its format shows the interweaving and the rejection of the state constitutional argument based on Roe. The state appellate court (App. 11a) pointed out that the trial court's finding that a fetus is a person entitled to redress was based on the state constitution. The state appellate court then rejected that conclusion because of Roe in the language immediately following:

> "As an initial matter, we note the fact that the trial court referred to the nonviable fetus in this case as a "person". We know of no court that has found a fetus of less than 3 months gestational age to be considered as a person entitled to legal protection. This finding runs counter to the United States Supreme Court ruling in Roe v. Wade 410 U.S. 113, 158(1973) ("all this...persuades us that the word 'person' as used in the Fourteenth Ammendment does not include the unborn").

A greater interweaving of state law and federal constitutional law is difficult to imagine.[4,5]

B. The state constitutional issue was not part of the state appellate court's rejection of petitioner's right to sue.

The ruling bases for the state appellate court's reversal of the trial court were set forth in two separate places, one near the start of the opinion (App. 12a-13a);

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4. Interweaving gives the United States Supreme Court jurisdiction. Illinois v. Rodriguez 497 U.S. 177, 110 S. Ct. 2793, 111 L.ed. 2d 148(1990); Milkovich v. Loraine Journal Co. 497 U.S. 1, 110 S. Ct. 2695, 111 L.ed. 2d 1(1990). New York v. Class 475 U.S. 106, 106 S. Ct. 960, 89 L.ed. 2d 81(1986) at 106 S. Ct. 964.

5. See also Perkins v. Benguet Consolidated Mining Co. 342 U.S. 437, 72 S. Ct. 413, 96 L.ed. 485 at p. 491, where the United States Supreme Court has jurisdiction where it appears the state court would have or even might have decided the case differently but for federal law's shadow upon the state law (at bar, the shadow of Roe).

> "Because the trial court erred in allowing the case to proceed to trial on the basis of a battery claim, we reverse..." (App. 3a)
>
> "Where a woman has freely consented to an abortion procedure on a non-viable fetus, a physician may not be held liable for battery to an unborn fetus."

Nothing in said conclusionary comments in the opinion establishes the state constitution as the basis for the holding. Even were there subsumed therein, the state constitutional issue, as pointed out above, said issue was rejected specifically based on Roe. This, as well as the comments in footnote 5 (App. 10a) is illustrative of how Roe was the core and nexus of the state court's reversing opinion.

III. UNDER 28 U.S.C. 1257 (a) THE STATE COURT NEED NOT DENY THE ENFORCEMENT OF A FEDERAL RIGHT TO GIVE THE SUPREME COURT JURISDICTION, BUT ONLY NEED TO RULE ON A RIGHT CLAIMED UNDER THE CONSTITUTION.

Respondent on p. 10-11 of its brief, contends that there must be the denial of a federal right in order for there to

be jurisdiction to review a state court decision. This, however, is not correct. 28 U.S.C. 1257(a) as amended in 1988 provides that a right need merely be "set up or claimed" under the federal constitution in state court proceedings in order for the judgment of said state court to be reviewable by certiorari. In the instant case, the respondent set up and claimed the federal constitutional right of the petitioner's mother to have the abortion as the bases for respondent to avoid liability. See App. 25a-35a and 37a-39a for respondent's state court arguments claiming and setting up such right.

Respondent's assertion that the state court judgment stands purely and solely on state grounds, were it accepted, would mean that any discussion by a state court of state law, irrespective of the federal issues presented, would preclude the Supreme Court from exercising its jurisdiction. This is a erroneous interpretation of the cases cited by petitioner herein and in the petition.

CONCLUSION

The state appellate court misapplied Roe and gave Roe's federal constitutional right an erroneous and overbroad interpretation. This erroneous interpretation gives the United States Supreme Court jurisdiction[6]. The mere possibility that the state court might have reached the same conclusion it did reach had it decided the question purely as a matter of state law does not create an adequate or independent state ground,[7] and the fact that the state court relied to the extent it did on federal grounds brings the merits of the federal issue before the United States Supreme Court.[8]

In Scott v. Sandford 60 U.S. 393, 15 L.ed 691(1857) the Court ruled that blacks were not persons and not entitled to any legal rights. After a long and arduous struggle, blacks succeeded in achieving those rights that are expected in a civilized society. The

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6. Harper v. Virginia Department of Taxation 509 U.S.____ 125 L.ed. 2d 74, 113 S. Ct.___ (June 18, 1993)

7. United Airlines v. Mahin 410 U.S. 623, 35 L.ed. 2d 545, 93 S. Ct. 1186(1973)

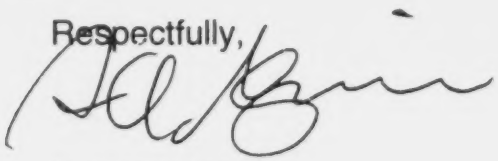
8. Oregon v. Kennedy 456 U.S. 667, 72 L.ed. 2d 416, 102 S. Ct. 2083(1982).

unborn, however, being physically unable to engage in a similar struggle, and lacking standing in the courts to raise their own rights, have had nobody to enforce their would-be rights before this case was presented. The Court should not allow 21st century hindsight to provide the final word upon the correctness of the legal status of the unborn, as 20th century hindsight has rendered judgment on Scott.

It is prayed that the petition be granted and the Court enunciate the latitude and parameters of the rights that states may provide under state law to the unborn.

Oct. 1 1993

Respectfully,



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